EDITOR'S NOTE

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(1)

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SUPREME COURT, U.S.

July 16, 1987

Re: Lavoyd Wayne "Bill" Hardin
V. Clifford F. McMaster
No. 86-2068

Attention: Francis J. Larson

Dear Mr. Larson,
Enclosed is the judgement and memorandum decision of Judge Michael A. McConnell of the U.S Bankruptcy Court and the order of Judge Eldon B Mahon, U.S District Court, By reading the judgement, memorandum decision, and order you can tell without a shadow of a doubt, they stole my farm from me by defying section 1303, 1304, 1306 and especially 1307 subsection E of the U.S bankruptcy code

Signed this 16th day of July, 1987

Respectfully yours

Lavoyd Wayne "Bill" Hardin

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ENTERED
BANKRUPTCY CLERK

IN RE:	§	
	§	
LAVOYD W. "BILL" HARDIN	§	
	§	
Debtor	§	CASE NO. 480-00513
	§	
LAVOYD W. "BILL" HARDIN	§	
	§	
Plaintiff,	§	
	§	
V.	§	ADVERSARY NO. 486-4071
	§	
CLIFFORD McMASTER, TRUSTEE	§	
	§	
Defendant.	§	

MEMORANDUM OF DECISION

On January 10, 1986, LAVOYD WAYNE "BILL" HARDIN, Debtor/Plaintiff ("Hardin"), filed a "Motion for Damages for Misapplication of Fiduciary Property" in the 220th District Court of Comanche County, Texas. Hardin sought damages in the amount of $184,800.00 plus costs and attorneys fees from Clifford F. McMaster, the Chapter 7 Trustee herein, for alleged "misapplication of fiduciary property". The state court action was subsequently removed to this Court on February 20, 1986 pursuant to the provisions of 28 U.S.C. §1452 and Bankruptcy Rule 9027.

A Scheduling Conference pursuant to Rule 7016(b) of the Bankruptcy Rules was held before the Court on April 7, 1986. At the Scheduling Conference, the Court denied an oral "motion

to remand" and set the matter for trial on the merits for June 2, 1986.1/

Trial on the merits of the Complaint was held before the Court on June 13, 1986; and the Court, having heard the evidence and the arguments of counsel, denied all relief sought by Plaintiff and rendered judgment in favor of the Trustee on his counterclaim. The Court also took under advisement the question of whether Plaintiff should be sanctioned under Rule 9011 of the Bankruptcy Rules for filing a frivolous Complaint, and set a hearing for July 7, 1986 for the purpose of determining the amount of attorney's fees incurred by the Trustee in defending the frivolous claim.

All hearings having been completed, the Court now enters this Memorandum of Decision setting forth its findings of fact and conclusions of law pursuant to Rule 7052 of the Bankruptcy Rules.

FINDINGS OF FACT

1. Bill Hardin and Joan Murle Hardin were divorced in 1976. As provided by their property settlement, Mrs. Hardin sold her one-half community interest in a 154 acre tract in Comanche and Erath Counties to Mr. Hardin, who executed a $25,000.00 promissory note with the farm as security for repayment of the note. Payments of $1,500.00 were to be made annually to Mrs. Hardin under the note. Mr. Hardin made the

---

1/ The Interlocutory Order Denying Remand and Setting Procedural Schedule entered on April 8, 1986 has been appealed to the United States District Court for the Northern District of Texas. The appeal is presently pending before the Honorable David O. Belew, Jr., Case No. 486-493K.

first annual installment on time on December 31, 1976, but did not make a subsequent payment on December 31, 1977 or at any time thereafter.

2. Mrs. Hardin sued Mr. Hardin in state court in 1978 on the unpaid balance of the promissory note and for foreclosure, and obtained an order from the district court that the note be accelerated and that the deed of trust lien be foreclosed. The Court of Appeals reversed the decision, but the Texas Supreme Court affirmed the District Court and ordered a sheriff's sale of the property. Hardin v. Hardin, 597 S.W.2d 347 (Tex.Sup.Ct. 1980). Before the property could be sold by the sheriff, however, Hardin filed a Chapter 13 bankruptcy proceeding in this Court on October 31, 1980.

3. On January 27, 1982 at a Chapter 13 plan confirmation hearing, this Court held that Hardin could deaccelerate the promissory note without curing the default, but that he must compensate his former wife for any damages she suffered as a result of the deacceleration. Hardin was ordered to file an amended Chapter 13 plan by April 19, 1982. When Hardin failed to do so by the court-ordered deadline, Mrs. Hardin filed a motion to convert this case to Chapter 7. This Court held a hearing on the motion on June 16, 1982. On that date, Hardin submitted an amended Chapter 13 plan which provided that Mrs. Hardin accept a lifetime one-half share and all income from the 154 acres in satisfaction of all her claims. Mrs. Hardin rejected the amended plan and the Court converted the proceeding to Chapter 7.

4. Following the conversion of this proceeding to Chapter 7, Mr. Clifford McMaster was appointed as the Chapter 7 trustee of the estate.

5. Mr. Hardin's subsequent motion to convert the proceeding to Chapter 11 was denied after a hearing on September 15, 1982. On September 22, 1982, this Court further determined that Hardin could not claim the 154 acre tract as his homestead (exempt property).

6. Hardin then appealed the Order Denying Motion to Convert Chapter 11 Proceeding and the Order on Trustee's Objection to the Debtor's Claimed Exemptions to the District Court. The District Court affirmed on November 30, 1983, and the United States Court of Appeals for the Fifth Circuit affirmed the District Court on August 22, 1984 (Appeal No. 84-1037).

7. Although all property of the estate had vested in the Chapter 7 Trustee, Hardin attempted to convey his interest in the 154 acre tract to a Mr. J. A. Hardin on August 24, 1983, and on January 6, 1984 the Texas Veterans Land Board deeded the property to J. A. Hardin. After notice and hearing, this Court declared both conveyances void and ordered J. A. Hardin to reconvey the 154 acres to the Trustee.

8. The District Court on March 9, 1984 ordered J. A. Hardin to execute a deed or appear at a March 20, 1984 hearing to "show cause" why he should not be held in contempt. Hardin attempted to appeal the March 9, 1984 district court show cause order to the United States Court of Appeals for the

Fifth Circuit (Appeal No. 84-1250), but the appeal was dismissed on May 24, 1984 for failure of appellant to file briefs.

9. On March 14, 1984, J. A. Hardin conveyed the 154 acres to the Trustee as ordered by this Court. The Texas Veterans Land Board then gave the Trustee a deed to the 154 acres.

10. After notice and a hearing, the Trustee sold the 154 acres to James Arthur pursuant to court order dated April 5, 1984.

11. Following conveyance of the property by the Trustee to Mr. Arthur, Hardin entered on the property, planted a crop of alfalfa and harrassed Mr. Arthur. Hardin also admitted to cutting the owner's lock on the gate in order to gain access to the property. The Trustee was then forced to come back to court to seek an injunction against further harrassment attempts by Hardin against the third-party purchaser. An injunction was issued by this Court, appealed to the District Court, and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1615).

12. On May 21, 1984, trial before the Court was held on a Complaint filed by the Trustee regarding the proposed disposition of the sales proceeds of the 154 acres. Mrs. Hardin was allowed a secured claim in the amount of $52,048.99 pursuant to her lien and reimbursement for attorney's fees in the amount of $8,100.00 and expenses in the amount of $491.30.

Judgment was entered by this Court on May 21, 1984, appealed to the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1614).

13. With respect to the Trustee's Counterclaim, the Court finds from the evidence that Hardin collected and cashed checks representing rentals from a grazing lease on the subject 154 acres although the checks were property of the bankruptcy estate and subject to the jurisdiction of this Court. Such payments totalled $7,000.00.2/

14. Hardin now seeks a recovery from the Trustee for "misapplication of fiduciary property" regarding the sale of the 154 acres. Hardin seeks damages in the amount of $184,800.00 plus costs and attorney's fees. The claims asserted by Hardin in this proceeding are clearly frivolous. The Court further specifically finds that the claims alleged in this Adversary Proceeding were intended to harrass, cause undue delay and increase the cost of litigation.

15. The Court further finds that the Trustee has incurred reasonable and necessary attorney's fees in the amount of $1,650.00 and $149.00 in expenses in defending the frivolous claims asserted in this Adversary Proceeding by Hardin.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and parties to this Adversary Proceeding pursuant to 28

2/ Copies of the checks were admitted into evidence at the trial of the instant Adversary Proceeding as Defendant's Exhibit No. 6.

U.S.C. §1334 and 28 U.S.C. §959 (suits against Trustees in bankruptcy cases).

2. The 1983 amendments to Rule 11 provide that "the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper. . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." In addition, Bankruptcy Rule 9011 includes pleadings filed in cases and adversary proceedings, and as one of the prohibited purposes "to cause delay or to increase the cost of litigation." Both rules provide that on violation, "the court on motion or on its own initiative shall impose on the person who signed [a document], the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred. . . including a reasonable attorney's fee". Cinema Service Corp. v. Edbee Corporation, 774 F.2d 584, 586 (3rd Cir. 1983); Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985); Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

3. The Committee Note to Rule 11 states that the rule is intended to reduce the reluctance of courts to impose sanctions. "Greater attention" by the courts to "pleading and motions abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." The Note also emphasizes the

rule's use of words such as "shall impose" to "focus the court's attention on the need to impose sanctions for pleading and motion abuses." Cinema Service Corp. v. Edbee Corporation, 774 F.2d 584, 586 (3rd Cir. 1985).

4. The requirements of Rule 9011 apply to pro se litigants as well as attorneys. Pro se litigants have the same duties and obligations as attorneys under Chapter 11, no more and no less. Ginter v. Southern, 611 F.2d 1226, 1227-1228 (8th Cir. 1979); In Re 1801 Restaurant, Inc., 40 B.R. 455, 457-458 (Bankr. D. Md. 1984).

5. The facts of this case are similar to the facts of In Re 1801 Restaurant, Inc., 40 B.R. 455 (Bankr. D. Md. 1984) where the trustee moved for an order assessing costs and damages against the president of the debtor corporation after a private sale of the debtor's assets was delayed by a series of spurious objections, requests for hearings, requests for reconsideration, and a notice of appeal filed by the president solely for the purpose of delay. Bankruptcy Judge Paul Mannes sanctioned the president $1,250 under Rule 9011 to compensate the trustee for the time and effort expended in connection with resisting the delaying tactics of the pro se litigant.

6. Similarly, in Matter of Plunkett, 47 B.R. 172 (Bankr. D. Wisc. 1985), Bankruptcy Judge C.N. Clevert assessed approximately $7,700 under Rule 9011 in attorney fees and costs against an individual defendant, appearing pro se and purporting to act on behalf of the corporate defendant, where the individual filed a frivolous motion for recusal of the

judge. Quoting from Wickstrom v. Ebert, 585 F.Supp. 924, 938 (E.D. Wics. 1984), Judge Clevert noted the problems caused by vexatious lawsuits, and his comments are particularly relevant to the instant case:

> "All too frequently, the courts of this district - and others throughout the country - are forced to expend their time and resources administering cases in which there is little, if any, basis for relief. Typically, such actions are filed in ignorance of the nature and scope of those remedies available to civil litigants under federal law.
>
> Occasionally, as in this case, ignorance is combined with malice in a suit which, by its very nature, commands the immediate and uninterrupted attention of the Court. The result is that other non-frivolous actions, technically on equal footing with vexatious suits, are not afforded the considered attention they merit, and justice is not done. That individuals like the present plaintiffs are able to so pervert the processes of our judicial system should be a source of great concern among all thinking people, both within and without the lgal profession.
>
> While this Court alone cannot remedy what has become a problem for courts across the nation, it can and will exercise its discretion in this case to sanction plaintiffs for the vexatious nature of their suit and the oppressive manner in which they have prosecuted it. In this undertaking, the Court follows a growing trend among the district courts in favor of awarding prevailing defendants the expenses they have incurred in the course of malicious litigation."

7. The claims asserted by Hardin in this Adversary Proceeding are frivolous in every respect. After proper notice and hearing, the Trustee sold the 154 acres in question to a third-party pursuant to Section 363 of the Bankruptcy Code and order of this Court. The disposition of the proceeds of sale has been carefully scrutinized in at least three interlocutory appeals to the Fifth Circuit Court of Appeals and found to be valid in every respect. Hardin's claims in this proceeding

that the Trustee "misapplied fiduciary property" are ludicrous and without foundation in law or fact. Sanctions under Rule 9011 are clearly mandated, and accordingly the Trustee is awarded $1,650.00 in fees and $149.00 in expenses.

8. Finally, the Trustee has clearly met his burden of proof on his Counterclaim regarding Hardin's conversion of $7,000.00 in funds of the estate. Hardin readily admitted at trial spending the proceeds of two checks which rightfully belonged to the Trustee. The Trustee is therefore entitled to judgment for the converted funds, costs and pre-judgment and post-judgment interest.3/

9. Judgment shall be entered in accordance with this Memorandum of Decision.

SIGNED this 13th day of July, 1986.

MICHAEL A. McCONNELL
U. S. BANKRUPTCY JUDGE

3/ Because the conversion of property of the estate may also violate federal criminal laws, the Court has asked the U. S. Attorney to investigate this matter.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
LAVOYD W. "BILL" HARDIN	§	
	§	
Debtor	§	CASE NO. 480-00513
	§	
LAVOYD W. "BILL" HARDIN	§	
	§	
Plaintiff,	§	
V.	§	ADVERSARY NO. 486-4071
	§	
CLIFFORD McMASTER, TRUSTEE	§	
	§	
Defendant.	§	

JUDGMENT

The above-referenced Adversary Proceeding came on for trial before the Court, the Honorable Michael A. McConnell, U. S. Bankruptcy Judge, presiding, and the issues having been duly tried and a Memorandum of Decision have been duly rendered, it is,

ORDERED, ADJUDGED AND DECREED that Plaintiff, LAVOYD W. "BILL" HARDIN, take nothing by his claims, that his action be dismissed on the merits, and that the Defendant, CLIFFORD McMASTER, TRUSTEE, recover of the Plaintiff, LAVOYD W. "BILL" HARDIN, his costs of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Counter-Plaintiff, CLIFFORD McMASTER, TRUSTEE, have and recover of the Counter-Defendant, BILL HARDIN, the sum of Seven Thousand Dollars ($7,000.00), with pre-judgment interest from the dates of conversion to date of judgment at the rates set

forth in 28 U.S.C. §1961 and post-judgment interest at the rate of 10% per annum until paid.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that CLIFFORD McMASTER, TRUSTEE, have and recover of BILL HARDIN the sum of $1,650.00 in attorney's fees and $149.00 in expenses as sanctions pursuant to Rule 9011 of the Bankruptcy Rules.

SIGNED this 13th day of July, 1986.

MICHAEL A. McCONNELL
U. S. BANKRUPTCY JUDGE

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DeLeon, Texas 76444

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
DEC 10 1986
NANCY HALL DOHERTY, CLERK
By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LAVOYD WAYNE "BILL" HARDIN

VS.

CLIFFORD McMASTER

CIVIL ACTION NO. 4-86-898-E

ORDER

Lavoyd W. "Bill" Hardin initiated this appeal from a judgment entered by Judge Michael McConnell on July 13, 1986. The July 13, 1986 judgment awarded the Trustee all his requested fees, expenses and costs and found that plaintiff's claims were "ludicrous and without foundation in law or fact." Appellate jurisdiction is based on 28 U.S.C. § 157. After careful consideration of the parties' briefs, the record on appeal, and the applicable law, the Court comes to the following decision.

The factual background of this case is as follows: On January 10, 1986, Lavoyd Wayne "Bill" Hardin filed a proceeding in the 220th District Court of Comanche County alleging misapplication of fiduciary property by Clifford F. McMaster, defendant. The state court action was removed to the bankruptcy court on February 20, 1986, and subsequent thereto, a scheduling conference was held on April 7, 1986. At this conference, the Court denied an oral motion to remand[1/] and set the matter for trial.

1/ The order denying remand was appealed to the United States District Court for the Northern District of Texas on June 19, 1986. The order was affirmed and the plaintiff's appeal was denied on July 16, 1986, on the ground that the order appealed from was a non-appealable order.

7

A trial on the merits of the complaint was held on June 13, 1986; and the Court, having heard the evidence and arguments, denied all relief sought by plaintiff and rendered judgment in favor of the Trustee on his counterclaim. A hearing was set and had on July 7, 1986, for the purpose of determining the amount of attorney's fees incurred by the Trustee in defending the frivolous claim. On July 13, 1986, a judgment and memorandum of decision were entered to which Hardin now appeals.

From appellant's convoluted brief, the Court discerns that there are three issues presented on appeal. The first issue is whether the United States Bankruptcy Court has jurisdiction over these proceedings. The second is whether the United States Bankruptcy Judge's findings of fact are clearly erroneous. And the final issue is whether the United States Bankruptcy Judge's conclusions of law are correct. The Court will address each of these issues separately.

First, the bankruptcy court has jurisdiction over these proceedings. The United States Code 28 U.S.C. § 157 and § 1334 provide that the bankruptcy court has jurisdiction to hear proceedings arising in or related to cases under title 11.

United States Bankruptcy Code, 28 U.S.C. § 1334, provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The proceeding that is the subject of this appeal shows on its face that it is a claim of misapplication of property by a trustee.

Such property being property of the estate, it is subject to the District Court's exclusive jurisdiction pursuant to 28 U.S.C. § 1334(d).

> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

Second, the Bankruptcy Judge's findings of facts are not clearly erroneous. This Court is bound to accept the factual findings of the bankruptcy court unless such findings are clearly erroneous. Fed. R. Civ. P. 52(a); Bankruptcy Rule 8013; In re Missionary Baptist Foundation of America, 712 F.2d 206, 209 (5th Cir. 1983); In re Bardwell, 610 F.2d 228, 230 (5th Cir. 1980). Appellant has made no showing that the findings of fact as entered by the bankruptcy judge are clearly erroneous. The bankruptcy judge's findings are duly supported not only by the record in this proceeding, but by the record in prior proceedings and by orders entered by this Court in Hardin v. Hardin, Civil Action No. 4-82-595-E consolidated with 4-82-597-E, memorandum opinion dated November 30, 1983 and January 10, 1984 (See Attachment 1) affirmed by the Untied State Court of Appeals for the Fifth Circuit No. 84-1037 on August 22, 1984 (see Attachment 2). It is further noted that this Court has previously found that the 154 acre tract of land is the property of the estate in Hardin v. McMaster proceeding No. 4-84-146-E by order dated April 24, 1984 (see Attachment 3), which order was affirmed by the United States Court of Appeals for the Fifth Circuit in proceeding No. 84-1398 by dismissal of appellant's appeal. (see Attachment 4.) Thus, the Court hereby finds that all of the points raised in appellee's brief have been raised and rejected in prior

appeals both to this Court, the Fifth Circuit Court of Appeals, and the United States Supreme Court.

Finally, the bankruptcy court's conclusions of law are correct. However, conclusions of law are "fully reviewable in this Court." Dallas-Fort Worth Regional Airport Board v. Braniff Airways, Inc., 26 Bankr. 628 (D.C.N.D. Tex 1982).

The conclusions of law set forth by the bankruptcy judge are clearly supported by the cases cited in the memorandum opinion signed July 13, 1986. These conclusions are that the bankruptcy court had jurisdiction of the subject matter pursuant to 28 U.S.C. § 1334, which has been supported on appeal by the judgment of the Honorable David O. Belew, signed July 16, 1986 in proceeding No. 4-86-493-K. In addition, the 1983 amendments to Rule 11, and specifically Bankruptcy Rule 9011, provided that the signature of an attorney or a party constitute a certificate that he had read the pleading and that same has not been interposed for any improper purpose such as harassment, unnecessary delay or needless increase in cost of litigation. Such rules are supported by Cinema Service Corp. v. Edbee Corporation, 774 F.2d 584, 586 (3rd Cir. 1983), David v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985). In addition, the requirements of these rules apply to pro se litigants; Ginter v. Southern, 611 F.2d 1226, 1227-1228 (8th Cir. 1979) and In Re 1801 Restaurant, Inc., 40 B.R. 455, 457-458 (Bankr. D. Md. 1984). Additionally, costs of proceeding may be assessed under Rule 9011 as set forth in the Matter of Plunkett, 47, B.R. 172 (Bankr. D. Wisc. 1985).

The bankruptcy judge found, based on the facts and the law, that the claims asserted by appellant were frivolous in every respect as

they had been scrutinized in at least three interlocutory appeals to the Fifth Circuit and had been found to be without merit. The Trustee having met his burden on his counterclaim regarding appellant's conversion of funds of the estate, which appellant readily admitted spending, supports the judgment against appellant.

Accordingly, the judgment of the bankruptcy court entered on July 13, 1988 in this case is hereby AFFIRMED.

Signed this 10th day of December, 1988.

Eldon B. Mahon

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-2068

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

IN THE MATTER OF
LAVOYD WAYNE HARDIN,
a/k/a "BILL HARDIN" DEBTOR,

LAVOYD WAYNE HARDIN,
a/k/a "BILL HARDIN",

PETITIONER.

VERSUS

CLIFFORD F. McMASTER, TRUSTEE

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
PETITIONER'S MOTION FOR LEAVE TO PROCEED AS A VETERAN

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH W. COLVIN
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ATTORNEYS FOR RESPONDENT,
CLIFFORD F. McMASTER, TRUSTEE

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the Petitioner may proceed before this Honorable Court as a Veteran under 38 U.S.C. §2022.

2.

The questions presented for review by Petitioner are not germane to the judgment which is the basis of the Petition for Writ of Certiorari. The only issues germane to the petition are as follows:

A. Whether the United States Bankruptcy Court had jurisdiction over these proceedings.

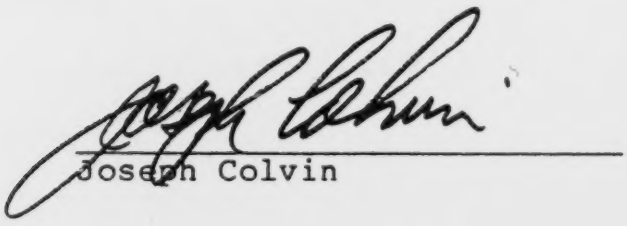
B. Whether the United States Bankruptcy Judge's findings of fact were clearly erroneous.

C. Whether the United States Bankruptcy Judge's conclusions of law were correct as reflected in his judgment and memorandum of decision entered July 14, 1986.

CERTIFICATE OF PARTIES TO THE PROCEEDING

The undersigned counsel of record for Clifford F. McMaster, Trustee, Respondent, certifies that the following are parties to this proceeding:

1. Lavoyd Wayne "Bill" Hardin
2. Clifford F. McMaster



Joseph Colvin

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JUDGMENTS BELOW

FIFTH CIRCUIT APPEALS:

84-1037 - judgment of district court affirmed, 8/22/84

84-1250 - dismissed for want of prosecution, failure to file briefs, 5/22/84

84-1396 - appeal dismissed, 9/26/84

84-1614 - appeal held frivolous, 12/20/84

84-1615 - judgment of district court affirmed, 12/20/84

85-1686 - appeal dismissed, 2/24/86

85-1726 - judgment of district court affirmed, 3/17/86

86-1545 - appeal dismissed, 11/20/86

86-1914 - judgment of district court affirmed, 4/1/87

APPEALS TO THE U.S. SUPREME COURT:

85-2135 - petition for certiorari denied, 11/17/86

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. §1254.

TABLE OF CITATIONS

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THE FOLLOWING CASES INVOLVE RELATED ISSUES

Hardin v. Hardin, No. 84-1037,
United States Court of Appeals
for the Fifth Circuit
(affirmed 8/22/84)

Hardin v. McMaster, No. 84-1250,
United States Court of Appeals
for the Fifth Circuit
(dismissed 5/24/84)

Hardin v. McMaster, No. 84-1396,
United States Court of Appeals
for the Fifth Circuit
(dismissed 9/26/84)

Hardin v. McMaster, No. 84-1614,
United States Court of Appeals
for the Fifth Circuit
(affirmed 12/20/84)

Hardin v. Arthur, No. 84-1615,
United States Court of Appeals
for the Fifth Circuit
(affirmed 12/20/84)

Hardin v. Gilbert & Colvin, No.85-1686,
United States Court of Appeals
for the Fifth Circuit
(affirmed 2/24/86)

Hardin v. Gilbert & Colvin, No. 85-1726,
United States Court of Appeals
for the Fifth Circuit
(affirmed 3/17/86)

Hardin v. Gilbert & Colvin, No. 85-2135, United States Supreme Court (Certiorari denied 11/17/86)

Hardin v. McMaster, No. 86-1545, United States Court of Appeals for the Fifth Circuit (dismissed 11/20/86)

Hardin v. McMaster, No. 86-1914, United States Court of Appeals for the Fifth Circuit (affirmed 4/1/87)

STATEMENT OF THE CASE

Petitioner has filed his petition for writ of certiorari and has included therein a motion for relief to proceed as a veteran pursuant to 38 U.S.C. §2022.

Petitioner's petition for writ of certiorari results from nine (9) previously unsuccessful appeals in the United States Court of Appeals for the Fifth Circuit. The prior appeals bear the following numbers: 84-1037, 84-1250, 84-1396, 84-1614, 84-1615, 85-1686, 85-1726, (Cert. denied U.S. Supreme Court 85-2135), 86-1545 and 86-1914. This petition for writ of certiorari is based on the affirmation of the judgment of the district court in Appeal No. 86-1914 on April 1, 1987. That appeal was from an

order affirming the judgment of the bankruptcy court which found, based on the facts and the law, that the claims asserted by petitioner were frivolous in every respect, as they had been scrutinized in at least three interlocutory appeals to the Fifth Circuit and found to be without merit.

SUMMARY OF ARGUMENT

The motion for relief to proceed as a veteran pursuant to 38 U.S.C. §2022 is not applicable to these proceedings as petitioner, for the first time, is asserting that his suit against the trustee was to obtain reemployment rights. Petitioner's motion, affidavit and service record reflect he was discharged forty (40) years ago. Such statute is not applicable as the trustee

in bankruptcy at no time was petitioner's employer, nor was there any showing in either the Bankruptcy Court, District Court or Court of Appeals for the Fifth Circuit that petitioner sought or was entitled to any of the rights claimed by 38 U.S.C. §2021.

Petitioner's questions presented for review have been partially, previously presented in his prior petition for writ of certiorari No. 85-2135, which petition was refused by this court. This new petition for writ of certiorari should be denied because petitioner has not raised any issues attacking the judgment that is the basis for the petition. Instead, for the first time he attempts to utilize various sections of 11 U.S.C. §1301 et seq. to justify his conversion of the proceeds of two checks which the court

found to be assets of the chapter 7 estate and rightfully belonged to the Trustee. Not only does petitioner misinterpret those sections which he cites, but he fails to mention that his Chapter 13 bankruptcy proceeding was converted to one under Chapter 7 in 1982 for failure to file an amended plan by the court-ordered deadline. Because all property of the estate vested in the Trustee some five years ago, the title 11 sections enumerated by petitioner have no bearing on the issues at hand.

ARGUMENT

This litigation, seeking to challenge a judgment affirming the findings of the bankruptcy court with respect to jurisdiction and findings of fact and conclusions of law, constitutes

the latest in a long series of efforts by Lavoyd Wayne "Bill" Hardin to harass the Trustee of his estate, as well as to waste judicial time and resources by continuing to perfect frivolous and unmeritorious appeals.

Respondent would show that the motion for leave to proceed as a veteran could not, under any of the facts in these proceedings, entitle petitioner to the benefits or rights under 38 U.S.C. §§2021, 2022. The petitioner, for the first time, asks leave of the court to establish reemployment rights as a veteran. The facts as enumerated have never been presented in any other court in these proceedings other than in the petition for writ of certiorari. Such petition includes three (3) documents addressing petitioner's right to proceed

as a veteran pursuant to 38 U.S.C. §2022. The first document is the motion itself where petitioner seeks to establish re-employment rights. The second document is petitioner's affidavit, and the third is a copy of petitioner's discharge from the Armed Forces. The statute under which petitioner moves sets forth certain rights.

United States Code, 38 U.S.C. §2021 provides in pertinent part as follows:

§2021. Right to reemployment of inducted persons; benefits protected

"(a) In the case of any person who is inducted in the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position

(other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

The enforcement rights claimed under such subsections are provided in United States Code 38 U.S.C. §2022, which provides in part as follows:

§2022. Enforcement procedures

"If any employer, who is a private employer or a State or political sub-

division thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

Petitioner's motion on its face shows non-compliance with 38 U.S.C. §2021

as petitioner's discharge which satisfied 38 U.S.C. §2021a(1) shows petitioner to have been discharged forty (40) years ago and thus on its face shows non-compliance with 38 U.S.C. §2021a(2) as petitioner has not alleged application for reemployment within ninety (90) days after such person is relieved from service. Petitioner's motion shows on its face the non-application of 38 U.S.C. §2021 and §2022 to his motion and substantiates Respondent's allegations that Petitioner has filed frivolous pleadings.

Petitioner's motion entitling petitioner to proceed under Rule 47 of the rules of this Honorable Court is an attempt by petitioner to exempt himself from the payment of fees and court costs to bring before this court an appeal pro-

ceeding which the bankruptcy court designated as frivolous in every respect and which the United States Court of Appeals for the Fifth Circuit described as a "totally frivolous appeal". Petitioner's writ of certiorari, therefore should not be entertained by this court as petitioner should be required to proceed as other citizens of the United States who seek to bring their cases before this court.

The writ of certiorari filed by petitioner presents for review matters all of which have been passed upon in appeals to the United States Court of Appeal for the Fifth Circuit and in the case of questions 2, 3 and 4 have been heretofore raised in a prior petition for writ of certiorari to this honorable court and refused. Respondent would show

that the issues addressed by the United States Court of Appeals for the Fifth Circuit were interpreted to be a challenge to the jurisdiction of the bankruptcy court and a challenge to the findings of fact and conclusions of law entered by the bankruptcy court regarding petitioner's homestead claims. Petitioner's writ could therefore be construed to present to this court those same issues and they therefore will be responded to in this brief.

I.

JURISDICTION

The United States Bankruptcy Court had jurisdiction over these proceedings when it entered its judgment and memorandum of decision on July 13, 1986. The United States Code, 28 U.S.C. §§157 and

1334 provide that the Bankruptcy Court has jurisdiction to hear proceedings arising under title 11 or arising in or related to a case under title 11.

The United States Code, 28 U.S.C. §1334, provides in pertinent part:

> (a) Except as proved in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The proceeding that is the subject of this petition shows on its face that it is a claim of misapplication of property by a Trustee. Such property peti-

EDITOR'S NOTE

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tioner claimed to be misapplied was the 154 acres of the estate, sold by the trustee pursuant to a bankruptcy court order, appealed by petitioner and affirmed by the United States Court of Appeals for the Fifth Circuit No. 84-1037. The claims by petitioner therefore are subject to the District Court's exclusive jurisdiction pursuant to 28 U.S.C. §1334(d):

> " The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate."

The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Jurisdiction therefore, is firmly established.

II.

BANKRUPTCY COURT FINDINGS OF FACT

The Court is bound to accept the factual findings of the Bankruptcy Court unless such findings are clearly erroneous. Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 8013. Petitioner has made no showing that the findings of fact entered by the bankruptcy judge are clearly erroneous. Such findings were as follows:

"1. Bill Hardin and Joan Murle Hardin were divorced in 1976. As provided by their property settlement, Mrs. Hardin sold her one-half community interest in a 154 acre tract in Comanche and Erath Counties to Mr. Hardin, who executed a $25,000.00 promissory note with the farm as security for repayment

of the note. Payments of $1,500.00 were to be made annually to Mrs. Hardin under the note. Mr. Hardin made the first annual installment on time on December 31, 1976, but did not make a subsequent payment on December 31, 1977 or at any time thereafter.

2. Mrs. Hardin sued Mr. Hardin in state court in 1978 on the unpaid balance of the promissory note and for foreclosure, and obtained an order from the district court that the note be accelerated and that the deed of trust lien be foreclosed. The Court of Appeals reversed the decision, but the Texas Supreme Court affirmed the District Court and ordered a sheriff's sale of the property. Hardin v. Hardin, 597 S.W.2d 347 (Tex.Sup.Ct. 1980). Before the property could be sold by the sheriff, however,

Hardin filed a Chapter 13 bankruptcy proceeding in this Court on October 31, 1980.

3. On January 27, 1982 at a Chapter 13 plan confirmation hearing, this Court held that Hardin could deaccelerate the promissory note without curing the default, but that he must compensate his former wife for any damages she suffered as a result of the deacceleration. Hardin was ordered to file an amended Chapter 13 plan by April 19, 1982. When Hardin failed to do so by the court-ordered deadline, Mrs. Hardin filed a motion to convert this case to Chapter 7. This Court held a hearing on the motion on June 16, 1982. On that date, Hardin submitted an amended Chapter 13 plan which provided that Mrs. Hardin accept a lifetime one-half share and all income

from the 154 acres in satisfaction of all her claims. Mrs. Hardin rejected the amended plan and the Court converted the proceeding to Chapter 7.

4. Following the conversion of this proceeding to Chapter 7, Mr. Clifford McMaster was appointed as the Chapter 7 trustee of the estate.

5. Mr. Hardin's subsequent motion to convert the proceeding to Chapter 11 was denied after a hearing on September 15, 1982. on September 22, 1982, this Court further determined that Hardin could not claim the 154 acre tract as his homestead (exempt property). [Hardin having claimed a house in DeLeon, Texas as his homestead and the court having granted such exemption.]

6. Hardin then appealed the Order Denying Motion to Convert Chapter 11

Proceeding and the Order on trustee's Objection to the Debtor's Claimed Exemptions to the District Court. The District Court affirmed on November 30, 1983, and the United States Court of Appeals from the Fifth Circuit affirmed the District Court on August 22, 1984 (Appeal No. 84-1037).

7. Although all property of the estate had vested in the Chapter 7 Trustee, Hardin attempted to convey his interest in the 154 acre tract to a Mr. J. A. Hardin on August 24, 1983, and on January 6, 1984 the Texas Veterans Land Board deeded the property to J. A. Hardin. After notice and hearing, this Court declared both conveyances void and ordered J. A. Hardin to reconvey the 154 acres to the Trustee.

8. The District Court on March 9, 1984 ordered J. A. Hardin to execute a

deed or appear at a March 20, 1984 hearing to "show cause" why he should not be held in contempt. Hardin (Lavoyd Wayne) but not J. A. Hardin, attempted to appeal the March 9, 1984 district court show cause order to the United States Court of Appeals for the Fifth Circuit (Appeal No. 84-1250), but the appeal was dismissed on May 24, 1984 for failure of appellant to file briefs.

9. On March 14, 1984, J. A. Hardin conveyed the 154 acres to the Trustee as ordered by this Court. The Texas Veterans Land Board then gave the Trustee a deed to the 154 acres.

10. After notice and a hearing, the Trustee sold the 154 acres to James Arthur pursuant to court order dated April 5, 1984.

11. Following conveyance of the property by the Trustee to Mr. Arthur,

Hardin entered on the property, planted a crop of alfalfa and harrassed Mr. Arthur. Hardin also admitted to cutting the owner's lock on the gate in order to gain access to the property. The Trustee was then forced to come back to court to seek an injunction against further harrassment attempts by Hardin against the third-party purchaser. An injunction was issued by this Court, appealed to the District Court, and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1615).

12. On May 21, 1984, trial before the Court was held on a Complaint filed by the Trustee regarding the proposed disposition of the sales proceeds of the 154 acres. Mrs. Hardin was allowed a secured claim in the amount of $52,048.99 pursuant to her lien and reimbursement

for attorney's fees in the amount of $8,100.00 and expenses in the amount of $491.30. Judgment was entered by this Court on May 21, 1984, appealed to the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1614).

13. With respect to the Trustee's Counterclaim, the Court finds from the evidence that Hardin collected and cashed checks representing rentals from a grazing lease on the subject 154 acres although the checks were property of the bankruptcy estate and subject to the jurisdiction of this Court. Such payments totalled $7,000.00.

14. Hardin now seeks a recovery from the Trustee for "misapplication of fiduciary property" regarding the sale of the

154 acres. Hardin seeks damages in the amount of $184,800.00 plus costs and attorney's fees. The claims asserted by Hardin in this proceeding are clearly frivolous. The Court further specifically finds that the claims alleged in this Adversary Proceeding were intended to harrass, cause undue delay and increase the cost of litigation.

15. The Court further finds that the Trustee has incurred reasonable and necessary attorney's fees in the amount of $1,650.00 and $149.00 in expenses in defending the frivolous claims asserted in this Adversary Proceeding by Hardin.

The bankruptcy judge's findings are duly supported not only by the record in this proceeding, but by the record in prior proceedings. The United States Bankruptcy Court has previously found

that the 154 acre tract of land at issue is property of the estate by an order which was affirmed by the United States Court of Appeals for the Fifth Circuit in proceeding No. 84-1396.

Petitioner at the trial, offered no evidence to support his claims of misapplication of fiduciary property and has made no showing that the findings of fact are erroneous, therefore the petition for a writ should be denied.

III.

BANKRUPTCY COURT CONCLUSIONS OF LAW

The Bankruptcy Court's conclusions of law are correct. The conclusions of law set forth by the bankruptcy judge are clearly supported by the cases cited in the memorandum opinion signed July 13, 1986. These conclusions are that the

Bankruptcy Court had jurisdiction of the subject matter pursuant to 28 U.S.C. §1334, which has been supported on appeal by the judgment of the Honorable David O. Belew, signed July 16, 1986 in proceeding no. 4-86-493-K. In addition, the 1983 amendments to Fed. R. Civ. P. 11, and specifically Fed. R. Bankr. P. 9011, provided that the signature of an attorney or a party constitute a certificate that he has read the pleading and that same has not been interposed for any improper purpose such as harassment, unnecessary delay or needless increase in cost of litigation. The requirements of these rules apply to pro se litigants. Additionally, costs of proceeding may be assessed under Fed. R. Bankr. P. 9011. The bankruptcy judge found, based on the facts and the law, that the claims

asserted by appellant were frivolous in every respect, having been found, after scrutiny by the United States Court of Appeals for the Fifth Circuit, to be without merit.

This petition is a reflection of an increasing abuse of the judicial process by petitioner. Having failed in numerous previous attempts to rehash his ten-year court history in both federal and state courts, Petitioner would now misapply the provisions of 11 U.S.C. §1301 et seq. to his bankruptcy estate, which, since 1982, has been administered under 11 U.S.C. 701 et seq. Sanctions should be imposed to prevent abuse of the appellate process and to compensate those required to prosecute or defend their rights in court. The authority for imposition of sanctions can be found in Fed. R. Civ. P. 11, which states in pertinent part:

> The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorneys' fee.

28 U.S.C. §1927 provides as follows:

> Any attorney or other person admitted to conduct cases in any court in the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees incurred because of such conduct.

Section 1927 is a weapon which the court may use in order to protect the judicial

process from abuse, to punish those who have abused it, and to provide relief for the party who has had to contend with the sanctioned party's vexatious litigation.

The sanctions which should be imposed are not only proper, but are necessary to protect the integrity of the judicial process. The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them. This Honorable Court should assess attorneys' fees and expenses against petitioner, who has willfully abused the judicial process.

The petition for writ of certiorari is principally based upon sections of the Bankruptcy Code commonly known as Chapter 13. These sections were found in 11 U.S.C. §1302 et seq. Petitioner's bankruptcy proceeding since 1982, has not

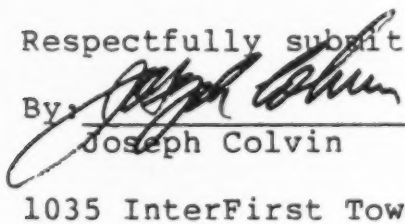
been administered under 11 U.S.C. §1301 et seq., but has been administered under 11 U.S.C. §701. The sections therefore cited in the brief by petitioner are not applicable or constitute blatant misstatements on a non-applicable statute.

For instance, Petitioner states "In Hardin's case 1307 of the Bankruptcy Code prohibits conversion of a Chapter 13 case to a Chapter 7." Hardin appealed such conversion to the District Court and advised the District Court in a hearing conducted on November 3, 1983, that he was abandoning such appeal." Hardin v. Hardin, United States District Court for the Northern District of Texas Memorandum Opinion, Civil Action No. 4-82-595-E dated November 30, 1983.

Respondent would show that the petitioner has therefore not raised any

issues germane to the judgment appealed, but is using the petition for writ of certiorari in an effort to bring before this court matters heretofore decided adversely to the petitioner by the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari should, therefore be denied.

Respectfully submitted,

By: 
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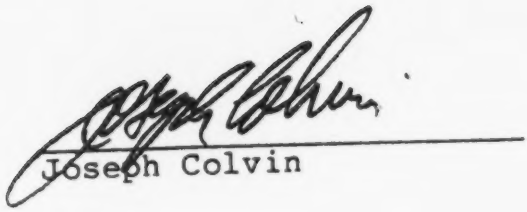
CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been served on all counsel of record, by mailing sets of same, on this 23 day of July, 1987.



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